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FRAUD IN LEGAL PROCEEDINGS.

Our present number contains, in the case of *Greene* vs. *Greene*, decided by the Supreme Judicial Court of Massachusetts, a highly interesting and instructive discussion on the doctrine of fraud as entering into and impairing the decrees and judgments of courts. Still the casual reader, who should not take into view the facts of the case, in considering the language employed by the learned chief justice who delivered the opinion of the court, might be led into errors to which the court itself would doubtless not go.

The case was this: a woman against whom a decree of divorce from her husband was regularly pronounced, ascertained, as she alleged, that he had obtained the decree by means of false testimony. So, supposing also that she had on her side cause for divorce against him, she filed her libel for divorce, and asked to have the first decree vacated for *fraud and collusion!* Of course there was no collusion, which is a corrupt agreement between the parties themselves; and the court very properly understood her to mean, what she did not say, that he had colluded with somebody else about the false testimony.

Now in this proceeding, there were two mistakes; first, in asking,

as a part of her prayer in her divorce suit, to have the former decree vacated; at least the practice has been understood to be, that the application should be made a supplementary part of the first suit, and not a part of another. But the second, and more fatal mistake was, in supposing, that she was entitled to go back of the time when the alleged fraud commenced, and have all the proceedings anterior to the hearing, proceedings which she admitted to be fair and right, declared void, because of a fraud practiced at the hearing. Here, evidently, she was entitled at the utmost to no more than to have the wrong righted, by beginning at the point at which the wrong began, and so having merely a new hearing upon the libel. Her application, should therefore, have been in some form in the nature of petition for review, what form precisely, it is not material here to inquire.

Nor need we inquire whether it is good law-English to call a judgment duly rendered on false testimony, fraudulent. It is not what is more commonly understood by a fraudulent sentence in a cause of divorce. And that third parties could take advantage of the fraud, if it be called such, in a sentence of this sort, there is little or no authority; and if the question were one of mere matrimonial status, and not one of property rights resting on independent ground, it would be contrary to those legal reasons which generally govern cases of this kind, to allow them to do so. The general doctrine is, that the matrimonial status must either exist or not, and that the law knows no uncertain relation, vibrating between the one and the other. How the court, as representing the public interest, might *ex officio* treat such a case on being made cognizant of the facts, would be another question.

But ordinarily when we speak of a fraudulent judgment, in divorce law, we mean something which is not often seen in other departments of jurisprudence. Thus a husband and wife wish to be legally separated, and they put their skill together to cheat the court. He makes, what he calls, a libel for divorce, and she either appears or does not, as may be thought best adapted to accomplish the object, and the judge is next imposed upon by false testimony: this is a case of what is called collusion. It was the Duchess of

Kingston's case. There is nothing sound, in beginning, middle or end. There is really no case in court; and whenever the judge is made cognizant of the fact, he will dismiss the semblance of a cause,—certainly he will, if informed of the matter before final judgment, and probably if informed of it at any time thereafter; and if there is, on the record books of the court, that which might deceive by looking like a record, he will have it cancelled. But the court would not hear the parties themselves setting up the fraud, not because the judgment was of any real force, but because it would be too unseemly a spectacle for a man to carry to a tribunal of justice his own dirt.

Another instance, of what is sometimes treated as fraud, occurs when a man applies for a divorce to the courts of a state in which neither he nor his wife has any domicile; representing—otherwise he would not be heard—that he resides within the state. Here the tribunal is imposed upon, and any decree it may render is a nullity.

A third illustration might be mentioned. In most of the states, the libellant must give personal notice of the suit, if the respondent lives within the state; but, if out of the state, there is a notice by publication; and the libel must truly aver the fact of residence. Now suppose a husband, while actually living with his wife, were to proceed against her for divorce on the ground of desertion; were to have a publication of his libel, which she might not see; and by false testimony get the court to make up a decree. Here would be a case of fraud. And in each of the three supposed cases the court would not, in fact, have passed upon anything. There would be both a *quasi* want of jurisdiction, and a *quasi* refusal to take jurisdiction.

In the last two supposed instances, the respondent was no party to the fraud. Would any one contend, however, that being defendant of record, the only thing for her, after becoming cognizant of the cheat, would be to ask for a rehearing; and that if the time for such a proceeding had elapsed, *she*, but nobody else, was bound by the decree? This may be so, but there is no authority for such a view. The Massachusetts case, we repeat, must be looked at in the light of its facts; and it cannot, therefore, be deemed an authority for

such a doctrine. On the other hand, it would be a bold proposition that she could, at any time whatever, apply for a review in these circumstances; for how could there be any rehearing when there was never in court any valid proceeding on which to base even the first hearing? If there is no foundation, there cannot be reared a superstructure resting on a foundation. When a fraud is practiced merely on a defendant, he may waive it; but how, in the cases supposed, is he to waive a fraud on the law and on the court.

The truth is, there is no law which necessarily lies so much in *dicta* as the matrimonial; nor any in which it is so unsafe to take *dicta*. Our best American judges have generally very little acquaintance with the subject; the bar for the most part know almost nothing about it; and as every lawyer expects to meet an antagonist as ignorant as he is, he takes no pains to learn. In the case we are considering, the court was compelled to find its way through an intricate and difficult subject with no adequate help from counsel, and if in a labored opinion, conducting to a correct conlusion, all the distinctions did not present themselves to the court, we should not be surprised.

If any reader should wish to follow up this topic more minutely, he will find a general statement of the law we have discussed in this article, as far as the decisions have gone, with the authorities, in Bishop on Marriage and Divorce, §§ 297, 300–303, 314, 350, 694–709, 717, et seq. The views advanced in this article are not all such as have passed to actual adjudication; and so far as they have not, they are respectfully submitted for consideration when the questions shall arise.

J. P. B.